FOR ARGUMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

MILES CURTISS MCKEE
ARMIN J. MOELLER, JR.
FUSELIER, OTT, MCKEE
& FLOWERS, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201
(601) 948-2226
Counsel for Petitioner

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PETITIONER'S REPLY BRIEF

I.

NEITHER RESPONDENTS NOR *AMICI CURIAE* SERIOUSLY DISPUTE ROADWAY'S ARGUMENT THAT "COSTS" UNDER SECTION 1927 MUST BE DETERMINED BY REFERENCE TO THE DEFINITIONS OF "COSTS" PROVIDED BY OTHER STATUTES AND OTHER AUTHORITY.

Roadway submits that little difference exists between the framework for analysis used by respondents and *amici* United States and EEOC, and the framework for analysis

employed by Roadway for construing the statutes involved in this case. That is, Roadway, respondents and *amici curiae* agree that, standing alone, 28 U.S.C. § 1927 provides only that undefined "costs" may be assessed. *Pet. Br.* at 17; *Resp. Br.* at 11; *Gov't. Br.* at 10.[1] The definition of the term "costs" in section 1927 thus may be determined only by reference to statutes or other authorities which do specify whether a particular expense is a taxable cost.

II.

IN DETERMINING THE DEFINITION OF "COSTS" UNDER SECTION 1927, A COURT MAY REFER TO ALL COST-DEFINITION STATUTES AND AUTHORITY, NOT JUST 28 U.S.C. §§ 1920 AND 1923.

The consensus, however, breaks down over the question of whether a court may refer to only two cost-definition statutes, 28 U.S.C. §§ 1920, 1923, or a court may refer to all cost-definition statutes and authority applicable to the case in determining whether a particular expense is a taxable cost, and thus a "cost" for purposes of section 1927. Respondents and *amici curiae* contend that reference is limited to sections 1920 and 1923, and to no other statutes. *Resp. Br.* at 11-12; *Gov't. Br.* at 10. Roadway maintains that reference may be made to all applicable cost-definition statutes and authority. *Pet. Br.* at 17.

Nowhere in their briefs do respondents or *amici curiae* claim that attorneys' fees are not taxable costs in Title VII and 42 U.S.C. § 1981 actions. Nor in the face of

[1] Citations to "*Pet. Br.*" refer to the Brief for the Petitioner. Citations to "*Resp. Br.*" refer to the Brief for Respondents. Citations to "*Gov't. Br.*" refer to the Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae.

this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678, 696-697 (1978), could a contrary argument reasonably be made. Instead, respondents and *amici curiae* essentially contend that, even though attorneys' fees technically are taxable costs in Title VII and 42 U.S.C. § 1981 actions, the Court should ignore this fact in construing section 1927's application to attorneys in such cases. They argue, in effect, that sections 1927, 706(k) and 1988 should not be enforced according to their plain meaning because to do so would produce "absurd or futile results" or "merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'" *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940).

A. Deterrence

Amici United States and EEOC in particular attack Roadway's construction of the three statutes on the theory that such an interpretation "would increase the financial hazard facing counsel for plaintiffs in such suits." *Gov't. Br.* at 13. The Government argues that "[i]t would surely be anomalous if the 'private-attorney-general concept' were to subject counsel for those enforcing the public policy to special hazards." *Id.* at 14-15 (citation omitted).[2] To the contrary, it is the Government's position which is "anomalous."

First, despite Government contentions in the instant case, a Justice Department official recently testified before Congress in support of proposed amendments to section 1927 which would specifically include attorneys' fees as

[2] In light of the Government's apparent concession that at least some "costs" may be assessed against plaintiff's attorneys under § 1927, *i.e.* those taxable costs enumerated in 28 U.S.C. §§ 1920, 1923, see *Gov't. Br.* at 10, the financial "hazards" argument presumably rests upon the potential dollar amount of the assessment, and not an absolute theoretical prohibition of all monetary assessments.

section 1927 "costs" in all cases.[3] Specifically, the Government opined that the amendments "would provide a meaningful disincentive to unreasonable delay in complex litigation." *Antitrust Procedural Act of 1979: Hearings on S. 390 Before the Subcommittee on Antitrust and Monopoly*, 96th Cong., 1st Sess., at 8 (1979) (statement of John H. Shenefield) [hereinafter cited as "*Senate Antitrust Hearings*"]. In the Government's view, the effect of fee awards against attorneys under section 1927 would be to encourage litigants and attorneys of limited means.[4] Thus, the Government advises this Court that public policy precludes acceptance of Roadway's construction of section 1927 while, at the same time, the Government lobbies for amendments to section 1927 which would accomplish the precise result Roadway submits, in this case, already can be reached under the existing language of the statute. The Government's representations to Congress on the one hand and to this Court on the other certainly represents an incongruous explanation of the public interest.

[3] See *Pet. Br.* at 16 n.13. Since its decision in the instant case, the Fifth Circuit has issued a rather confusing decision which may stand for the proposition that attorneys' fees may be assessed under § 1927 against attorneys who file frivolous appeals. *Self* v. *Self*, No. 79-1569, slip op. at 4352 (5th Cir. April 2, 1980). The court's decision in the instant case is not cited in *Self*.

[4]

> Such unjustified behavior delays the adjudication of legitimate claims and defenses, unnecessarily increases costs to the litigants, and squanders limited judicial resources. Sometimes it may coerce parties to settle litigation simply to escape needless expenses and frustration. This potential for abuse makes it difficult for the less wealthy to protect their interests through the courts and thereby creates public cynicism towards the judicial system.

Senate Antitrust Hearings, *supra*, at 8 (statement of John H. Shenefield). *See also id.* at 14 ("Unfortunately, the statute [§ 1927] has been underutilized and has received varying restrictive interpretations in the courts.").

Second, Roadway acknowledges that its construction of the statutes involved in this case could, and hopefully will, deter some lawyers from conducting frivolous and vexatious civil rights litigation. Irresponsible civil rights lawyers, like irresponsible lawyers generally, serve only to detract from the success of the litigation, extort settlements, clutter the courts, and create such widespread distrust of the motives for such suits that the serious and important issues they often raise may be clouded by attorney-provoked cynicism. Deterrence is a necessary and proper purpose of the statute.[5]

Third, completely overlooked by *amici* and respondents is the overall effect of the court of appeals' decision on the individual litigant, who, by any standard, was intended by Congress to have the widest possible latitude in vindicating his civil rights. Whatever the relative percentage, responsibility for at least some vexatious Title VII litigation lies with the plaintiff's lawyer. The court of appeals' decision leaves, as a matter of law, sole economic responsibility for these cases with the plaintiff. That result is fundamentally unfair.

Finally, the Government's policy arguments overlook the potential benefits of attorney liability for the civil rights plaintiff. Fair employment practice litigation, like antitrust cases, frequently involves complex questions of procedure, liability and relief. As in antitrust cases, see *Senate Antitrust Hearings*, *supra*, the potential for abuse is always present. Just as it cannot be presumed that all members of the plaintiff civil rights bar conduct such litigation reasonably and responsibly, nor can it be pre-

[5] Since it apparently is appropriate to provide extra incentives to plaintiff's counsel in the form of bonuses for efficient, professional advocacy, *e.g.*, *Parker* v. *Califano*, 20 Fair Empl. Prac. Cas. 1522, 1525-26 (D.D.C. 1978), it would also seem appropriate to have available disincentives to counsel who unreasonably and vexatiously increase costs.

sumed that all members of the defense civil rights bar conduct themselves responsibly. Attorneys' fees liability under section 1927 would extend with equal force to defense counsel who unreasonably and vexatiously multiply the proceedings. Defense counsel's knowledge that he, rather than the defendant, may be held responsible for the economic consequences of such conduct would create a "chilling" effect on defense counsel's conduct to the same degree as it would on plaintiff's counsel. Insofar as litigation may have been thwarted by defense counsel's conduct, private enforcement of the civil rights statutes would be expedited.

B. Avoiding the "Hostile Judge"

Amici United States and EEOC also contend that

> there is a substantial risk that permitting judicial discretion to assess attorney's fees against plaintiff's counsel in civil rights cases would be perceived as creating a risk for any such counsel appearing before a hostile judge.

Gov't. Br. at 14.[6] Although the term "hostile" is not expanded upon by the Government, it must be presumed from the context in which it appears that the hostility relates to perceived judicial antipathy toward civil rights cases. Like the deterrence argument, absolutely no support is offered by the Government for its view of the

[6] *In re Primus*, 436 U.S. 415 (1978), and *NAACP* v. *Button*, 371 U.S. 415 (1963), cited by the Government in support of the above-quoted proposition, have absolutely nothing to do with this case. Access to the courts, the First Amendment, and rights of association are not at issue in this case.

Respondents also insert a vague reference to the asserted First Amendment right of litigants to effective counsel in civil cases. *Resp. Br.* at 16. Whether respondents Piper, Brown and Stromile somehow violated their clients' First Amendment rights is not before the Court.

federal judiciary.[7] In any event, the argument fails to recognize that

> while it was certainly the policy of Congress that Title VII plaintiffs should vindicate "a policy that Congress considered of the highest priority," . . . it is equally certain that Congress entrusted the ultimate effectuation of that policy to the adversary process.

Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412, 419 (1978) (citations omitted). It would indeed have been anomalous for Congress to entrust the federal judiciary with a national policy "of the highest priority" if Congress had not trusted the judiciary's discretion in effectuating that policy and in fairly treating attorneys employed as the policy's advocates.

Even assuming the validity of the Government's theory, it does not follow that the discretion should be withheld. Unless the "hostile judge" theory extends above the district court level, review of section 1927 assessments in the courts of appeals and in this Court is certainly available. Moreover, in assertedly extreme cases, plaintiff's counsel may request that the hostile judge recuse himself or herself from consideration of the case. *E.g.*, *Marshall* v. *Georgia Pac. Corp.*, 22 Fair Empl. Prac. Cas. 132 (E.D Ark. 1980).

The Government submits that, given the existence of the hostile judge, broader enforcement of the civil rights laws will be achieved by limiting the wrath of the hostile judge to the "litigant who may appear before that judge once in a lifetime," *Gov't. Br.* at 14, and thus excluding the

[7] *Cf. Ferri* v. *Ackerman*, No. 78-5981, slip op. at 8 n.17 (U.S. Dec. 4, 1979) ("But respondent has not directed our attention to any empirical data . . . to support his conclusions that the risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants . . . .").

"lawyer who must practice [repeatedly] before a hostile judge." *Id.* The Government thus suggests that sacrificing the plaintiff, a mere visitor in the halls of justice, to the hostile judge is preferable to exposing the plaintiff's lawyer. Roadway's only response to such suggestions is to restate the arguments in such a manner that their fundamental defects may be observed. These defects amply support Roadway's position that placing some responsibility on attorneys does not lead to the absurd or unreasonable results which the Government argues are portended by the plain meaning of the statutes involved in this case.

C. The Merit-Conduct Distinction

Both respondents and *amici curiae* urge the Court to drive an artificial wedge between section 1927, and sections 706(k) and 1988 based upon section 1927's asserted limitation to "the manner in which the suit is litigated," *Gov't. Br.* at 12, and the claimed restriction of sections 706(k) and 1988 to "the merit of the suit itself." *Id; accord, Resp. Br.* at 14-15.[8] From this distinction, it is argued that, since the district court in the instant case was precluded by the attorneys' vexatious conduct from making a complete determination relative to the merit of the plaintiffs' claims, attorneys' fees were not awardable under sections 706(k) and 1988.

[8] Such arguments for restricting attorneys' fee liability under the civil rights acts have been frequently made to this Court and have been consistently rejected. *See Hutto* v. *Finney*, 437 U.S. 678, 696-97 (1978) (state not exempted by the Eleventh Amendment); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 420-22 (1978) (plaintiff not exempted); *id.* at 422 n.20 (noting that the United States has abandoned its arguments that the federal government is exempted by 28 U.S.C. § 2412); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 (1968) (per curiam) (defendant's good faith not a defense). Under the theories advanced by respondents and *amici curiae*, attorneys alone would enjoy immunity.

The asserted limitation of sections 706(k) and 1988 to the "merit" of a claim is shallow at best. Since the court is precluded from considering the manner in which the case was conducted in exercising its discretion as to attorneys' fees, the limitation presumes that unreasonable, vexatious litigation of a valid claim should be protected. The limitation also ignores the fact that unreasonable and vexatious conduct can, as in the instant case, prevent any determination of the claim's merit. Consequently, under the merit-conduct distinction, vexatious conduct is essentially transformed into a defense to an award of attorneys' fees under sections 706(k) and 1988.

The effects of the merit-conduct distinction are illustrated best by application. In *EEOC* v. *Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978), for example, after lengthy pre-trial proceedings, the EEOC, "on the morning of the trial," *id.* at 1272, dismissed "without prior notice to either the Defendant or to the Court," [9] "not less than 90% of the case it originally filed." [10] Remanding the district court's judgment of attorneys' fees against the EEOC for further consideration in light of the Court's recently-issued decision in *Christiansburg*, the court observed, *obiter dictum*, that

> it is apparent to us that attorneys' fees in this case might be due the defendant for being required to defend against that part of plaintiff E.E.O.C.'s claim which was dismissed by the E.E.O.C. on the morning of trial.

570 F.2d at 1271-72. Since the merits of the dismissed claims were not decided in *Datapoint*, under respondents' and *amici's* construction of sections 706(k) and 1988, such

[9] 457 F. Supp. 62, 66 (W.D. Tex. 1978) (opinion on remand).
[10] 457 F. Supp. at 66.

abuses would be excluded from consideration as a basis for an award of attorneys' fees under those statutes.[11]

Despite claims by respondents and *amici curiae* that the merit-conduct distinction is apparent on the face of the statutes, the fact of the matter is that "[t]he terms of section 706(k) provide no indication whatever of the circumstances under which either a plaintiff *or* a defendant should be entitled to attorneys' fees." *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 418 (emphasis in original). Instead, "equitable considerations" define the circumstances. *Id.* Congress certainly did not intend for the civil rights acts to protect abuses of the judicial process[12] through a contrived distinction between the merit of a claim and the manner in which it is litigated. Congress intended " 'to discourage frivolous suits,' " *id.* at 420, *quoting* 110 Cong. Rec. 14214 (1964) (remarks of Sen. Pastore), an intent which cannot reasonably be construed to exclude frivolous, vexatious multiplication of the suit

[11] Certainly the conduct of the litigation is a proper consideration in awarding attorneys' fees to a prevailing plaintiff. *See generally Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974). Likewise, it would seem that plaintiff's counsel's vexatious conduct of the litigation falls within the "special circumstances" exception noted in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam). There is thus no reason to exclude plaintiff's counsel's conduct from the court's discretion in awarding fees to a defendant.

[12] Sufficient abuse of the judicial process could overwhelm the courts and destroy the judicial system as an effective branch of government. This, and any discernible degree thereof, such as the bad faith litigation found here, the courts have a constitutional duty to prevent. By our interpretation of the statute involved [section 706(k)] we have found here no intent of Congress to permit any abuse of the judicial process.

Copeland v. *Martinez*, 603 F.2d 981, 992 n.69 (D.C. Cir. 1979), *cert. denied*, 48 U.S.L.W. 3465 (U.S. Jan. 21, 1980) (No. 79-647).

proceedings. Neither section 706(k) nor section 1988 is couched in terms of "merit costs" and "conduct costs." The statutes provide only for attorneys' fees "as part of the costs." [13]

The conduct of the litigation is an appropriate guide to the district court's discretion whether to award costs, including attorneys' fees, to a defendant. Since the plaintiffs in this case were "bound by the acts of [their] lawyer-agent," *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962), the costs of the attorneys' misconduct could have been assessed against the plaintiffs. The district court properly shifted those costs, including attorneys' fees, to the attorneys pursuant to section 1927.

III.

ATTORNEYS' FEES ALLOWABLE UNDER THE "BAD FAITH" EXCEPTION TO THE AMERICAN RULE MAY BE SHIFTED FROM A PARTY TO HIS ATTORNEY UNDER SECTION 1927.

Respondents and *amici curiae* acknowledge that the " 'bad faith' exception to the 'American rule' allows an award of fees against the party." *Resp. Br.* at 18; *accord*,

[13] Respondents and *amici curiae* suggest that Roadway overlooks the fact that this Court's opinion in *Christiansburg Garment Co.* v. *EEOC*, *supra*, focused on the merit of the plaintiff's claim. Roadway agrees that *Christiansburg* did focus on the merit of the claim but disagrees that the facts of that case control the question of whether a merits-conduct distinction is present in the statutes. The question was not presented in *Christiansburg*.

Simply stated, *Christiansburg* held that the merit of the plaintiff's claim is an appropriate guide to the district court in exercising its discretion to award attorneys' fees to a defendant. Nowhere in its opinion did this Court preclude the district court from considering the conduct of the litigation in exercising its discretion.

Gov't. Br. at 15-16. They overlook, however, the agency relationship between attorney and client, and the fact that attorneys' actions, *e.g.*, misconduct in litigation, may be imputed to the client. *Link* v. *Wabash R.R.*, *supra*, 370 U.S. at 634. Again, section 1927 authorizes the court to shift costs, and thus attorneys' fees, which may be imposed on the client to the attorney.

IV.

NONE OF THE OTHER MISCELLANEOUS CONTENTIONS BY RESPONDENTS AND *AMICI CURIAE* SUPPORT AFFIRMANCE.

A number of contentions are made by respondents and *amici curiae* which warrant only a short reply.

First, it is contended that the legislative history of section 1927 compels the conclusion that section 1927 "costs" were intended to include only those expenses "precisely defined in 28 U.S.C. 1920 and 1923." *Gov't Br.* at 9; *accord*, *Resp. Br.* at 10. Assuming *arguendo* the validity of that conclusion, respondents and *amici curiae* overlook the fact that "Congress [may] amend its definition of taxable costs." *Hutto* v. *Finney*, *supra*, 437 U.S. at 696. That is precisely what Congress did when it enacted sections 706(k) and 1988, which include attorneys' fees "as part of the costs."

Second, *amici* United States and EEOC argue that "there is no indication in their legislative history [*i.e.* sections 706(k) and 1988] that Congress intended to modify the settled interpretation of Section 1927." *Gov't. Br.* at 11. What this "settled interpretation" is, the Government does not state. Roadway submits that the only interpretation of section 1927 that may be considered "settled" is Congress' citation, in the 1948 Judicial Code recodification, of *Motion Picture Patents Co.* v. *Steiner*, 201

F. 63 (2d Cir. 1912), and the limitation of section 1927 in that case to "taxable costs." *Id.* at 65. See H.R. Rep. No. 308, 80th Cong., 1st Sess. A164 (1947). The Government discusses neither *Steiner* nor the 1948 amendments in its brief.

Third, respondents and *amici curiae* fail to recognize those decisions holding that Congress is presumed to know of the existence of its prior legislation and to pass subsequent statutes with full knowledge of the preceding provisions, particularly when both the prior and subsequent act concern the same subject; in this case: "costs."[14] Accordingly, when Congress passed sections 706(k) and 1988, thus including attorneys' fees "as part of the costs" in certain cases, Congress is presumed to have had knowledge of section 1927's existence and obvious operation.

Fourth, Roadway agrees with the Government that

> words in a statute that have "a well known meaning ... in the law of this country ... are presumed to have been used in that sense unless the context compels to the contrary."

Gov't. Br. at 10, *quoting Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978). Congress clearly intended for attorneys' fees to be awardable "as part of the costs" in sections 706(k) and 1988. Moreover, in civil rights legislation, the fact that "costs" include attorneys' fees is certainly a "well known

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[14] *See, e.g., Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972) ("[W]henever Congress passes a new statute, it acts aware of all previous statutes on the same subject.").

meaning" attached to the term.[15] Consequently, there is no reason to depart from the accepted definition of the word "costs" in Title VII and 42 U.S.C. § 1981 actions in determining the definition of "costs" in section 1927.

Respectfully submitted,

MILES CURTISS MCKEE
ARMIN J. MOELLER, JR.
JEFFREY A. WALKER

FUSELIER, OTT, MCKEE
& FLOWERS, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201
(601) 948-2226

Counsel for Petitioner

[15] The "as part of the costs" language in § 706(k) and § 1988 is hardly an accident. Petitioner's review of the United States Code discloses that attorneys' fees are provided for in 58 statutes. Of these 58 statutes, five allow costs "together with" attorneys' fees, 17 allow attorneys' fees separate from costs, 21 allow costs "including" attorneys' fees, and 15 allow attorneys' fees "as part of the costs." Seven of the 15 statutes which allow attorneys' fees "as part of the costs" are provisions of various "civil rights" and "employment rights" statutes. Education Amendments of 1978, 20 U.S.C. § 3205 (*inter alia*, protection from discrimination on the basis of race, color or national origin in elementary and secondary education); Jury System Improvements of 1978, 28 U.S.C. § 1875 (protection of jurors' employment); Voting Rights Act of 1965-Extension, 42 U.S.C. § 1973*l*(e) (protection of "voting guarantees of the fourteenth or fifteenth amendments"); The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (protection of numerous civil rights); The Civil Rights Act of 1964, Title II, 42 U.S.C § 2000a-3(b) (protection against discrimination or segregation in places of public accommodation); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k) (protection against employment discrimination on various grounds); Railway Labor Act, 45 U.S.C. § 153(p) (disputes between employees and carriers).